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Nos. 83-1321, 83-1432, 83-1433,
83-1442, 83-1443 and 83-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, *et al.*,
Petitioners

v.

TENNECO OIL COMPANY, *et al.*,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS, WILLIAM G. WEBB, *et al.*, IN OPPOSITION

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QUESTION PRESENTED

Whether the opinion below has any prospective effect in view of Congress' determination through passage of the Natural Gas Policy Act, 15 U.S.C. § 3301 *et seq.*, to exempt from the Federal Energy Regulatory Commission's jurisdiction under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, natural gas that was not already dedicated under such statute prior to November 8, 1978.

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As respondents, William G. Webb, *et al.*, (Webb)[1] oppose the petitions for a writ of certiorari to the United

[1] This brief in opposition is filed on behalf of the following respondents:

William G. Webb, Estate of J. Glenn Turner, Benson-Montin-Greer Drilling Corporation, B & M Construction Corporation, Earl A. Benson, *et al.*, Edna Fern Benson, Oliver Benson, Walter Benson, Barbara Ann Bruss, Albert Greer, Charlene

States Court of Appeals for the Fifth Circuit filed by The People of the State of California, *et al.* (California) in No. 83-1321; The Public Utility Commission of Oregon, *et al.* (Oregon) in No. 83-1432; Northwest Pipeline Corporation, *et al.* (Northwest) in No. 83-1433; El Paso Natural Gas Company (El Paso) in No. 83-1442; Pacific Gas and Electric Company, *et al.* (Pacific) in No. 83-1443; and the Federal Energy Regulatory Commission (Commission) in No. 83-1618.[2]

STATUTES INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), provides:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transporta-

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Greer, Charles Albert Greer, La Plata Gathering System, Inc., Jack London, Jr., O. J. Lilly, Barbara Irene McConnell, A. C. Montin, Jr., William V. Montin, Estate of C. W. Murchison, Oklahoma and Northwestern Company, Frank A. Schultz, Sue Reeder Turner Trust, Jaqulyn Williams.

In Opinion No. 642, 49 F.P.C. 17 (1973), the Federal Power Commission (now the Federal Energy Regulatory Commission) held the lease-sale transactions of these Webb parties to be non-jurisdictional, *i.e.*, not subject to the Commission's jurisdiction under the Natural Gas Act. The order of the Commission now under review purports to hold that these same lease-sale transactions, as well as other, different lease-sale transactions involving other parties, are jurisdictional. The Webb parties do not waive and specifically reserve their rights under the doctrines of collateral estoppel and *res judicata* which they raised below, but which the court below did not address. 708 F.2d 1011 at 1020 (App. 1a at 19a).

[2] Pursuant to Rules 22 and 34.2, Webb adopts the portions of the Petition filed by California in response to Rule 21.1(b), (d), and (e). The Appendix (App.) references in this brief are to the appendix volume filed by California with its petition in No. 83-1321.

tion or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 601(a)(1)(A) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3431(a)(1)(A), provides:

Sec. 601. Coordination with the Natural Gas Act.

(a) Jurisdiction of the Commission Under the Natural Gas Act—

(1) Sales—

(A) Natural Gas Not Committed or Dedicated.—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after the date of the enactment of this Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of enactment of this Act solely by reason of any first sale of such natural gas.

REASONS FOR DENYING THE WRIT

Aside from the fact that the decision of the Fifth Circuit is correct on both the law and the facts of this case, the argument advanced by the petitioners as to why this Court should grant certiorari does not exist. The petitioners' common theme is that the decision of the Fifth Circuit, if allowed to stand, will create a regulatory loophole in the Commission's jurisdiction under the Natural Gas Act ("NGA") through which future lease sale transactions can slide.[3] The simple answer is that Congress

[3] All the petitioners in one form or another state that "this case presents an important question concerning the scope of the Commission's jurisdiction under the Natural Gas Act." Pet. of FERC (No. 82-1618), page 10; Pet. of California (No. 82-1321), page 13;

has already determined through passage in 1978 of the Natural Gas Policy Act ("NGPA") to terminate the Commission's jurisdiction under the Natural Gas Act with respect to such future transactions. Thus, as a result of Congress' passage of the NGPA, this case stands alone and has no precedential effect as to new lease sale transactions because such new transactions are by law now exempt from the NGA.

Through passage in 1978 of the Natural Gas Policy Act, Congress determined to freeze the jurisdiction of the Commission under the Natural Gas Act, and to limit the scope of the NGA to that natural gas which had already been committed or dedicated under the NGA. By NGPA § 601(a)(1)(A), 15 U.S.C. § 3431(a)(1)(A), Congress excluded from all future jurisdiction of the Commission under the NGA first sales of natural gas which was not committed or dedicated to interstate commerce as of November 8, 1978, the day before the date of the enactment of the NGPA. Even with respect to natural gas which was already dedicated under the NGA, NGPA § 601(a)(1)(B), 15 U.S.C. § 3431(a)(1)(B), removed from any continuing Commission jurisdiction under the NGA high-cost natural gas [as defined in Section 107(c), 15 U.S.C. § 3317(c)], new natural gas [as defined in Section 102(c), 15 U.S.C. § 3312(c)], and natural gas produced from new onshore production wells [as defined in Section 103(c), 15 U.S.C. § 3313(c)].

In *Pennzoil Co. v. FERC*, 645 F.2d 360, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142, the Fifth Circuit explained the NGPA's restriction on the Commission's NGA jurisdiction. The Fifth Circuit observed that the effect of NGPA § 601(a)(1) was to prevent "the universe of gas subject to the NGA from expanding" and to remove "from continuing NGA jurisdiction sales of certain gas

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Pet. of Oregon (No. 83-1432), page 13; Pet. of Northwest (No. 83-1433), page 14; Pet. of El Paso (No. 83-1442), page 12; and Pet. of Pacific (No. 83-1443), page 2.

that nevertheless was committed or dedicated to interstate commerce on November 8, 1978." Similarly, in *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, —— U.S. ——, 103 S. Ct. 3024, 3031, 77 L.Ed.2d 668, 678 (1983) this Court explained:

> The NGPA is designed to preserve the Commission's authority under the NGA to regulate natural gas sales from pipelines to their customers; however, it is designed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called "first sales" of natural gas.

Thus, it is clear that, by passage of the NGPA, Congress has precluded prospective application of the NGA to natural gas which was not already committed or dedicated on November 8, 1978, when the NGPA was enacted.

As a result, lease sales consummated today, or at any time after the effective date of the NGPA, are exempt from any jurisdiction of the Commission under the NGA even if lease sales are construed to be sales of gas.[4] This is so because such leases sales would generally involve new natural gas that had not previously been produced and therefore had not been committed or dedicated prior to 1978. Being of such uncommitted stature, NGPA § 601(a)(1)(A) would expressly preclude application of the Commission's jurisdiction under the NGA to such lease sales, even if they constituted sales of gas. Consequently, even if the petitioners were correct in their argument that the Fifth Circuit's opinion restricts the Commission's jurisdiction under the NGA, their argument

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[4] Assuming *arguendo* that lease sales may be construed as sales of gas, the only exception to this statement is the unlikely instance where a new lease sale might involve gas that was already committed or dedicated prior to enactment of the NGPA. But even as to these lease sales the Commission would retain its pre-existing NGA jurisdiction only if the gas involved was not "new high cost gas," "new natural gas," or "gas from new onshore wells." See NGPA § 601(a)(1)(B). Respondents are not aware of any such lease sales of previously committed gas having been made since passage of the NGPA, and petitioners cite to none.

provides no basis for granting certiorari because Congress has already determined by enactment of the NGPA to preclude Commission jurisdiction under the NGA with respect to such sales.

Since the NGPA now bars the ultimate question presented in this case from arising again, the petitions for a writ must fail. An analogous situation arose in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). In that case, after oral argument and affirmance by an equal division of this Court, it became evident, on a petition for rehearing, that a subsequently enacted state statute "bars the ultimate question presented in this case from again arising in that State." 349 U.S. at 73. Accordingly, the Court dismissed the writ as "improvidently granted." To the same effect is *Cook v. Hudson*, 429 U.S. 165 (1976).

A student of this Court's practice, Mr. R. L. Stern, has stated:

> The first and obvious conclusion to be drawn from the cases discussed is that a conflict will not necessarily result in the granting of certiorari if the issue is no longer a live one. In the first four cases the statute upon which the controversy rested had expired or been amended in a manner which would prevent the problem from arising in the future. In each case, it was nevertheless true that a substantial number of pending or potential cases would still be controlled by resolution of the conflict. But this did not convince the Court that review of the decisions of the court of appeals was warranted.[5]

So far as respondents are aware, there are no pending cases involving the assertion of NGA jurisdiction over lease-sale transactions. The only real question petitioners raise is "no longer a live one," but turns only on the particular facts of this case alone under the Natural Gas Act.

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[5] Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 470 (1953).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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